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In the Supreme Court of the United States

OCTOBER TERM, 1968.

ANTHONY J. SCHERER, JR.,

Petitioner,

vs.

KENNETH MORROW,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes Anthony J. Scherer, Jr., Plaintiff-Appellant below, by his duly authorized attorneys, Julius L. Sherwin and Theodore R. Sherwin, and prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered September 25, 1968, (App. B).

In support of this petition your petitioner respectfully shows:

OPINIONS BELOW

The District Court filed a Memorandum of Opinion, which is appended to this petition.

The Opinion of the Court of Appeals, for the Seventh Circuit was filed September 25, 1968, and is reported in 401 F. 2d 204.

JURISDICTION

This Court's jurisdiction is invoked pursuant to the Act of June 5, 1968, c. 646, 62 Stat. 928, Title 28 U.S.C. §1254.

QUESTION PRESENTED FOR REVIEW

Does the Doctrine of Official Immunity extend and protect from suit an agent of the United States Secret Service assigned to lecture trainees of the Police Department of the City of Chicago, upon the responsibilities and actions of the United States Secret Service in protecting the President of the United States, where, after completing that lecture he maliciously slanders petitioner, a private citizen?

STATEMENT OF THE CASE

Petitioner seeks a reversal of the judgment of the Court of Appeals for the Seventh Circuit, entered September 25, 1968, affirming the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered October 31, 1967, in favor of the respondent and against the petitioner, on the respondent's motion for summary judgment that the slanderous statements were protected by official immunity, under *Barr* v. *Matteo,* 360 U.S. 564.

The action was commenced by Petitioner's filing of his complaint at law with a demand for a jury on December 8, 1966, in the Circuit Court of Cook County, Illinois (App. 3-5).

The complaint seeks damages in the sum of One Hundred Thousand Dollars ($100,000.00) by reason of the false, defamatory and slanderous words spoken by the respondent against the petitioner.

Petitioner's complaint alleged that on or about December 10, 1965, at Chicago, Illinois, the respondent in the presence and hearing of approximately 30 persons, most of whom were trainees in the Department of Police of the City of Chicago maliciously spoke of and concerning the petitioner the following false and defamatory words to-wit:

> "That Scherer, he's a nut."

The respondent thereby meant and intended to mean and it was understood to persons hearing such statement that the petitioner was a mentally deranged person.

That at the same time and place and in the presence of the same persons he also spoke of and concerning the petitioner the following false and defamatory words to-wit:

> "We went to his house and deactivated the cannon that he had pointed, O'Hare Field, the day President Johnson came to Chicago."

Thereby the respondent meant and intended to mean and it was understood by persons hearing such statement as meaning that petitioner intended to make use of his discharge a cannon at President Lyndon B. Johnson for the purpose of assassinating him or inflicting severe bodily harm upon him. That the statements were wholly false. (App. 4-5)

Respondent filed a petition for removal which petition alleged among other things that the action arose out of incidents alleged to have occurred at a time when respondent was acting under the color of his office as an Agent

of the United States Secret Service. (App. 2-3) Respondent thereafter filed his answer and motion for summary judgment together with supporting affidavits. The answer contained an affirmative defense alleging that respondent at the time and place of the event complained of and while performing those acts complained of which are admitted herein, was in the scope of his official duties and under color of his office as a Special Agent of the United States Secret Service. (App. 6)

Respondent's affidavit admitted that on December 10, 1965, he lectured before a class of Cadet Police Officers of the Chicago Police Department at the Police Department Academy, Chicago, Illinois. That he was directed by the Asst. Special Agent in Charge of the United States Secret Service to so lecture.

That he would lecture to that group upon the responsibilities and actions taken pursuant thereto of the United States Secret Service including remarks on the functions and actions of protecting the President of the United States. That during a question and answer period following the lecture a question was asked by one of the cadet officers of petitioner, which he answered to the best of his ability. (A. 7)

The affidavit of Maurice G. Martineau states that on December 10, 1965, he was Asst. Special Agent in Charge of Chicago Office of United States Secret Service that in compliance with the instructions of the Director of the United States Secret Service he directed respondent to lecture before a class of cadet officers of the Chicago Police Department on the history, jurisdiction and functions and activities of the United States Secret Service. That the purpose of the lecture was to instruct the cadet officers to

make them knowledgeable of Secret Service responsibilities and enable them to cooperate with the Secret Service.

His affidavit also set forth the legislative authority for the United States Secret Service protection of the President and that pursuant to that authority the Office of the Director of the United States Secret Service was established by the Secretary of the Treasury. That the Director compiled United States Secret Service manual which provides in part:

> "It will always be paramount that law enforcement organizations be made knowledgeable of our responsibilities in order for us to obtain their full cooperation. They must have as much information as necessary in order to carry out their support function. Their instructions must be explicit so that they are clearly aware of all Secret Service requirements." (Section 911.1, paragraph 4) "Lectures may include remarks on Presidential protection only in relation to our responsibilities as prescribed by law. (This does not apply to training lectures before law enforcement groups.)" (Section 912.2, paragraph 3)
>
> "Each SAIC (Special Agent in Charge) is responsible for the establishment and development of effective puble relations within his district. The necessity for establishing personal contact with other law enforcement officials . . . is self-evident." (Section 912.1, paragraph 3)
>
> "Lectures on the history of the Secret Service, jurisdictional responsibilities and activities will be made by SAIC's and SA's (Special Agents) who are qualified speakers . . ." (Section 912.2, paragraph 1)

* * *

The purpose of the lecture was to:

> ". . . instruct the cadet officers so as to make them knowledgeable of all Secret Service responsibilities and to enable them to extend to the Secret Service the fullest cooperation and support in the discharge by the Secret Service of its statutory responsibilities."

Petitioner filed a counter-affidavit stating that the allegations of fact contained in the complaint are true and correct and that there were approximately 30 Police trainees at a training program at the Police Department Academy, Chicago, Illinois, and at that time and place the respondent said of the plaintiff the matters alleged in plaintiff's complaint. Petitioner's complaint stands undenied by any affidavit.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT, NAMELY: THE EXTENT OF THE AUTHORITY OF A SECRET SERVICE AGENT IN LECTURING TO A MUNICIPAL POLICE TRAINING GROUP OF THE FUNCTIONS AND ACTIONS OF THE SECRET SERVICE IN PROTECTING THE PRESIDENT OF THE UNITED STATES. DOES THAT AUTHORITY INCLUDE THE ABSOLUTE RIGHT TO MALICIOUSLY SLANDER A PRIVATE CITIZEN AFTER HE HAS COMPLETED HIS ASSIGNED LECTURE?

Petitioner is no stranger to this Court. He petitioned for certiorari in Case No. 719 in the October, 1967 term, in the case entitled *Scherer* v. *Brennan and Noack.* The petition was denied, Justice Douglas voting to grant the writ 389 U.S. 1021.

In the case at bar, the opinion states that Justice Schnackenberg, who participated in the hearing, oral arguments and the conference of the division judges, died prior to the adoption of the opinion. He was of the view that the judgment order of the district court should be reversed. The basis for the ruling below was that the action of the respondent in stating in a question and answer period following his assigned lecture,

"That Scherer he's a nut", that the secret service had deactivated the cannon that he [petitioner] had pointed

at O'Hare Field the day President Johnson came to Chicago, was absolutely privileged. It being within the "outer perimeter" of his line of duty, citing *Barr* v. *Matteo,* 360 U.S. 564, and the court's opinion in *Scherer* v. *Brennan,* 379 F. 2d 609, 611.

As stated in our petition in *Scherer* v. *Brennan and Noack* it has become standard practice of the United States whenever one of its employees or officials sued to have that person file an affidavit supported by the affidavit of a superior, that his actions which are the subject matter of the suit were done within the scope of his authority. That practice was followed in the case at bar. Respondent filed his affidavit stating that as Special Agent of the United States Secret Service, he was directed by his superior to lecture before a class of cadet police officers of the Chicago Police Department. That he has a standard lecture including remarks on the functions of the United States Secret Service in protecting the President of the United States. (App. 7). His superior's affidavit confirmed the assignment of the respondent to make the lecture at which the slanderous statements were made. That affidavit states that the purpose of the lecture was to instruct the cadet officers so as to make them knowledgable of all Secret Service responsibilities.

The slanderous statements alleged in petitioner's complaint occurred during a question and answer period following the lecture and were not within the "outer perimeter" of respondent's authority. He was specifically assigned to give a standard lecture on the functions of the United States Secret Service in protecting the President and to instruct the cadet officers to make them knowledgeable of Secret Service responsibilities. It was not part of that lecture to call plaintiff a "Nut". That was not

a part of his assignment. It was also improper and beyond his lecture assignment to state that the plaintiff had pointed a cannon at O'Hare Field the day President Johnson came to Chicago. And that the Secret Service deactivated it. The record in *Scherer* v. *Brennan and Noack* discloses that petitioner had possession of a cannon, which was kept in his garage. It was not pointed at O'Hare Field. It was not deactivated by the Secret Service.

In *Buck* v. *Colbath,* 70 U.S. 334, 346, the defendant, a United States Marshal, was held liable for the wrongful attachment in seizing property of the plaintiff. The court stated:

> "We see nothing therefore in the mere fact that the writ issued from the Federal Court, to prevent the marshal from being sued in the State court, in trespass for his own tort, in levying it upon the property of a man against whom the writ did not run, and on property which was not liable to it."

In *Colpoys* v. *Gates,* 118 F. 2d 16, 17 (C.A.D. of C.) a complaint in libel and slander against a United States Marshal was held not subject to a motion to dismiss on the basis of official immunity. The Marshal published statements explanatory of his dismissal of certain of his deputies. The Court stated:

> "It was appellant's duty to investigate charges, if any were made, against his deputies. It may or may not have been his duty to dismiss his deputies. It was not his duty publicly to discuss their dismssal or publicly to explain the reasons for it. He had no duty to tell the public anything about them, unless possibly the bare fact that they were no longer on his staff. In the cases which have extended an absolute

> privilege to administrative officers without policy-determining functions, the thing held to be prvileged has usually if not always been an act in the general line of duty. not a separate discussion or explanation."

In the same manner in the case at bar the lecture having been made by the respondent pursuant to his assignment it was beyond the scope of that assignment when the lecture was concluded to maliciously slander petitioner.

In *McComb* v. *United States Housing Corporation,* 264 F. 589 (D.C. Del.), the court ruled that when officers of the government act under invalid authority, or exceed or abuse their lawful authority, and thereby invade private rights secured by the Constitution, an action to redress injuries caused by the unauthorized act is not a suit against the government.

In *United States* v. *Lee,* 106 U.S. 196, 218, the assertion by the officers of the government of their authority to act did not foreclose judicial inquiry into the lawfulness of their action. That a determination of whether their "authority is rightfully assumed, is the exercise of jurisdiction and must lead to the decision of the merits of the question."

In *Land* v. *Dollar,* 330 U.S. 731, 738, the holding of the *United States* v. *Lee* was approved, the court stating that public officials may become tort-feasors by exceeding the limits of their authority.

Barr v. *Matteo* does not protect respondent. The slanderous statements were not part of his assigned lecture, and are not protected by the official immunity doctrine.

II.

THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT MISINTERPRETS AND IS IN CONFLICT WITH BARR v. MATTEO, 360 U.S. 564. TO PREVENT FURTHER MISINTERPRETATION AND EXTENSION OF THE RULING OF BARR v. MATTEO BY THE LOWER FEDERAL COURTS, IT SHOULD BE RE-EXAMINED OR OVERRULED. THE DOCTRINE OF GOVERNMENTAL IMMUNITY SHOULD BE LIMITED NOT EXPANDED.

The doctrine of official immunity has been extended by the lower courts beyond the scope of the decisions of this court in announcing such doctrine. The trend in all of the States has been to limit this doctrine. The trend in the federal lower courts has been to expand this doctrine. This trend should be reversed.

In the landmark case of *Spalding* v. *Vilas,* 161 U.S. 483, this official immunity extended to a cabinet officer, and that a publication claimed to constitute an alleged libel was "not unauthorized by law nor beyond the scope of his official duties."

In *Barr* v. *Matteo,* this court relying on *Spalding* v. *Vilas* extended the official immunity doctrine to an executive officer of high rank. The lower federal courts have expanded the doctrine to cover a multitude of sins. The expansion of this doctrine is best characterized in Gray, Private Wrongs of Public Servants, 47 Cal. L. Rev. 303, 337:

> "Once spawned by the Supreme Court, the doctrine was nurtured carefully by the District of Columbia Court of Appeals. In a series of cases, stretching over forty years, the District of Columbia court has expanded the somewhat innocuous circumstances of the *Spalding* case, to cover a multitude of sins. Mali-

> cious defamation, whether of the intragovernmental, confidential report type, or of the public statement species, wrongful prosecutions of a vicious nature, conspiracies to obtain convictions on perjured evidence, and the intentional imposition of an illegal tax for the purpose of ruining the plaintiff's business, have all been sheltered by this doctrine. Of greater significance, the limitation of the *Spalding* case to 'heads of Executive departments,' a restriction which at least confined this power to a group numerically small and publicity prone, was scrapped completely, so that not only Cabinet Ministers, but also officials such as United States attorneys, FBI agents, prison wardens, parole officers, SEC commissioners, assorted bureaucrats, and just plain policemen, have been allowed to claim this privilege. Swept away by such a deluge, other federal courts, with barely a nod to state law on the way, have followed the District of Columbia lead until there is now a self-contained body of more than thirty federal court cases standing for the administrative immunity doctrine."

This article written in 1959 obviously does not cover a great number of cases which the lower federal courts have held that the official immunity doctrine applies.

The petitioner in the case at bar was denied a cause of action when he was unlawfully prevented from entering his own home. He is now publicly branded as an insane person and an attempted assassin by a federal agent acting clearly without any authority. He has again been denied relief based upon the extension by the lower courts of the doctrine announced in *Spalding* v. *Vilas* and *Barr* v. *Matteo*. These decisions do not support the rulings below. It is time that the gross abuse created by this doctrine be ended.

Respondent is not a cabinet officer, nor an executive officer of high rank. He could be granted no lawful authority to slander a private citizen, but his action in so doing

has been upheld by the lower courts. It is time that the unbridled license assumed by all federal officials of high and low rank be limited, and they be held responsible for their tortious conduct.

On December 9, 1968, this court granted Certiorari in the case of *Willingham* v. *Morgan,* No. 228. While that case involves a question of procedure, it also involves the application of the official immunity doctrine to federal officials of lower rank. Certiorari should be granted in the case at bar, and the case consolidated for hearing and argument with *Willingham* v. *Morgan.* Then the entire doctrine of official immunity may be reexamined and proper guide lines spelled out so that the doctrine of immunity is applied to proper officials only and kept within proper limitations.

CONCLUSION

Wherefore, petitioner prays for the allowance of a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in the case entitled *Anthony J. Scherer, Plaintiff-Apepllant* v. *Kenneth Morrow, Defendant-Appellee,* No. 16661, in order that this case may be reviewed and determined by this Honorable Court.

Respectfully submitted,

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